87-362

Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

JOHN K. C. HYSLIP,

Petitioner,

vs.

ROBERT SLOAN, Mayor, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, FOURTH DEPARTMENT

PETITION FOR A WRIT OF CERTIORARI

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August 27, 1987

Question Presented.

Whether a municipality's noncompliance with an affirmative action clause of its zoning law constitutes an unlawful taking of Petitioner's property contrary to the 14th Amendment to the United States Constitution.

List Of All Parties.

John K. C. Hyslip, *Petitioner*

Robert Sloan, Mayor;

The Board of Trustees of the Village of Alfred;

The Alfred Village Planning Board;

The Alfred Village Zoning Board of Appeals;

Richard S. Lang, Zoning Officer, *Respondents*

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PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT APPELLATE DIVISION, FOURTH DEPARTMENT

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, John K. C. Hyslip, respectfully prays that a writ of certiorari issue to review the denial of motion for leave to appeal of the New York State Court of Appeals entered on this proceeding on June 4, 1987 affirming the final Order of the New York State Supreme Court, Appellate Division, Fourth Department of November 10, 1986.

Opinion Below.

The denial of motion for leave to appeal in the New York State Court of Appeals, reported at 69 N.Y.2d 611, appears in the Appendix.

The New York Supreme Court, Appellate Division, Fourth Department rendered a final Order, reported at 124 A.D.2d 1060, which is attached in the Appendix.

The New York State Supreme Court, Allegany County rendered an unreported Memorandum, Decision and Order which is attached in the Appendix

Jurisdiction.

Motion for leave to appeal (No. 217) the final Order of the New York State Supreme Court, Appellate Division, Fourth Department was denied by the New York State Court of Appeals and entered on June 4, 1987 in the Office of the Clerk.

This Court's jurisdiction is invoked under 28 U.S.C. s. 1257(3).

As motion for leave to appeal was denied by the New York State Court of Appeals, the New York State Supreme Court, Appellate Division, Fourth Department is the highest State court available to Petitioner from which appeal can be taken.

Constitutional and Statutory Provisions Invoked.

United States Constitution, 5th Amendment:

... (no person shall be) deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, 14th Amendment:

... No state shall make or enforce any law which will abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Village of Alfred Zoning Ordinance, s. 306.0:

The (zoning) Board of Appeals shall act in strict accordance with the procedure specified by law and by this ordinance. All appeals and applications made to the Board shall be in writing, on forms prescribed by the Board, and available from the Zoning Inspector.

... At least thirty (30) days before the date of the hearing on an application to appeal to the Board of Appeals, the secretary of said Board shall transmit to the Planning Board a copy of this notice of the aforesaid hearing and shall request that the Planning Board submit to the Board of Appeals, its opinion on said application or appeal, and the Planning Board shall submit a report of such advisory opinion prior to the date of said hearing.

Failure to submit such report shall constitute approval of said application or appeal by the Planning Board. Final action shall be completed by the Board of Appeals within sixty-two (62) days after the public hearing.

The 1985 Village of Alfred Zoning Ordinance, s. 406(E)(4):

At least thirty (30) days before the date of the hearing, the secretary of the Zoning Board of Appeals shall submit to the Planning Board a copy of the appeals form under discussion. One (1) week prior to the hearing, the

Planning Board will transmit to the Zoning Board of Appeals its opinion on the application or appeal.

Failure to submit such a report will constitute approval of said application or appeal by the Planning Board.

Statement of the Case.

In 1983, Petitioner applied for a building permit to construct a pizzeria, health spa, and apartment in the Village of Alfred, County of Allegany, State of New York.

The Village of Alfred (Respondents) denied Petitioner a building permit. In doing so, they failed to follow the law then existing, the 1971 Zoning Ordinance, as it applied to administrative referrals between the Zoning Board of Appeals and the Planning Board.

The absence of a referral and responding opinion at the municipal level mandated approval of Petitioner's application.

The sworn certification of the secretary of the Alfred Village Planning Board is attached in the Appendix.

That certification attests that the mandatory referral requirements of the then existing zoning law were not met by Respondents.

The referral failure should have resulted in an absolute grant of permit to Petitioner under the local ordinance as it existed then and as it exists now.

The Federal question of deprivation of due process under the law was first raised by Petitioner in his Trial Court Petition at pages 7, 8 and 12 which are attached in the Appendix.

The Memorandum, Decision and Order of the Trial Court specifically ordered that the due process claim

(referral failure) was not cognizable in that Court. (10a - 11a)

That Order is attached in the Appendix.

On appeal to the New York State Supreme Court, Appellate Division, Fourth Department, the Brief for Petitioner addresses this mandatory referral failure at Point I.

A copy of Point I of Petitioner's New York Appellate Division Brief is attached in the Appendix.

The decision of the New York State Appellate Division, Fourth Department denied the due process claim.

That Court's final Order of November 10, 1986 specifically relies on Respondents' 1985 zoning law.

Respondents enacted this ordinance during the trial proceedings. Respondents' 1985 zoning law also supplies the provision regarding the mandatory administrative referral in unaltered form from its 1971 predecessor.

Under either ordinance the referral failure equates automatically to a zoning permit as a matter of law.

Petitioner's deprivation arises from Respondents' failure to comply with this affirmative action requirement.

Petitioner was denied leave for motion to appeal to New York's highest court, the Court of Appeals. In his motion for leave to appeal, Petitioner again raised the referral deprivation, copy of pertinent part attached in Appendix.

The motion for leave to appeal was denied without addressing Petitioner's due process argument.

Petitioner's highest State court of last resort in this instance is the New York State Supreme Court, Appellate Division, Fourth Department.

Reasons for Granting Writ.

The New York courts have denied Petitioner the due process guarantees of the United States Constitution, 5th and 14th Amendments.

The challenged decision here involving the 5th and 14th Amendments runs contrary to decisions of Federal Courts of Appeals.

Respondents failed to abide by the ordinance as written. Respondents failed to protect Petitioner's property rights.

The challenge here involves Respondents' direct failure to issue a permit under the law as written.

The particular issue presented here is one in which this Court has not directly ruled and the question should be settled by this Court to resolve the conflict presented.

A municipality's failure to scrupulously comply with statutory notice and hearing requirements renders the action void. **Carter v. City of Salina,** 773 F.2d 251 (10th Cir. 1985).

Respondent's failure to comply with the administrative referral provision mandates grant of permit under the statute.

Once a municipal board has an administrative duty to approve zoning plans, the board's refusal to do so is a violation of landowner's guarantee of due process. **Southern Cooperative Development Fund, et al v. Driggers**, 696 F.2d 1347 (11th Cir. 1983).

Respondents' refusal to grant the Petitioner his permit after their administrative referral failure amounts to a taking of Petitioner's property rights. **First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California,** 482 U.S. _____ (6/9/87).

Petitioner properly alleged a taking in his Petition challenging the validity of the enforcement of the zoning ordinance under the Federal Constitution.

The New York Supreme Court, Appellate Division, Fourth Department denied the issue.

The question was never reached by the New York Court of Appeals.

By upholding the referral failure, the New York courts upheld the validity of State action under the taking statutes (1971,1985) raising the Federal constitutional question at issue here - deprivation of property without due process of law and without just compensation. **First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California**, 482 U.S. _____ (6/9/87).

Respondents' failure to comply with their zoning law in denying Petitioner is an arbitrary and capricious action depriving Petitioner of his property rights. **First English Evangelical Lutheran Church of Los Angeles, California**, 482 U.S. _____ (6/9/87).

This Court has not reached the issue of whether an administrative failure to comply with a zoning statute, which provides for approval of a building permit upon the failure, amounts to an unwarranted taking contrary to due process requirements.

The New York decision, if allowed to stand, is clearly contrary to the law established by the various Circuit Courts of Appeal and this Court.

This Court will provide much needed zoning guidance by reaching the question presented here.

Petitioner is entitled to the building permit he requested four (4) years ago.

CONCLUSION.

For these reasons, a writ of certiorari should issue to review the final Order of the New York State Appellate Division, Fourth Department and the New York State Court of Appeals' denial of motion for leave to appeal.

Respectfully submitted,

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August 27, 1987

NEW YORK STATE COURT OF APPEALS

pp
No. 217

(Decided: June 4, 1987)

John K. C. Hyslip,

Appellant,

vs.

Robert Sloan, Mayor; The Board of Trustees of the Village of Alfred; et al.,
Respondents.

Motion for leave to appeal denied.

Appellate Division Order.

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FOURTH JUDICIAL DEPARTMENT

Decided November 10, 1986.

PRESENT: DOERR, J.P., BOOMER, GREEN, PINE, BALIO, JJ.

John K. C. Hyslip, *Appellant,*

v.

Robert Sloan, Mayor; The Board of Trustees of the Village of Alfred; The Alfred Village Planning Board; The Alfred Village Zoning Board of Appeals; and Richard S. Lang, as Zoning Officer, Respondents.

The above named John K. C. Hyslip having appealed to this Court from a judgment of the Supreme Court, entered in the Allegany County Clerk's office on March 26, 1985 and said appeal having been argued by William Pulos of counsel for appellant, David Franz of counsel for respondents, and due deliberation having been had thereon,

It is hereby ORDERED, That the judgment so appealed from be and the same hereby is unanimously affirmed, without costs.

Memorandum, which is hereby made a part hereof.

Entered: Nov 10, 1986
CARMEN S. LEONE, Clerk

Judgment unanimously affirmed without costs. Memorandum: Petitioner appeals the dismissal of his article 78 petition, in which he sought to overturn the decision of the Village of Alfred Zoning Board of Appeals which had upheld the denial of a building permit to construct a pizzeria, apartment and health spa in the village on the ground that petitioner did not meet the parking requirements of the zoning ordinance.

We must apply Local Law 1-1985, since it is the law existing at the time of this decision (Matter of Boardwalk & Seashore Corp. v Murdock, 286 NY 494, 498-499; Park of Edgewater, Inc. v Joy, 50 NY2d 946, 948, rearg denied 51 NY2d 770; Matter of Alscot Investing Corp. v Inc. Vil. of Rockville Centre, 64 NY2d 921, 922). That ordinance requires parking adjacent to the proposed commercial use to be within 300 feet of the commercial use, measured along public thoroughfares. Petitioner failed to meet that requirement, as his parking was within 300 feet only if measured over privately owned property which he had no right to use. His permit therefore was properly denied. Nor has petitioner met the "special facts" exception, which requires a showing that officials acted in bad faith by delaying or denying his application while they changed the law. Further, no showing was made that under the law in effect at the time of the original application, petitioner would have been entitled to a permit (see, Matter of Pokoik v Silsdorf, 40 NY2d 769, 772-773, rearg denied 42 NY2d 824). The zoning ordinance then in effect provided that parking must be within 300 feet but was silent with respect to how the distance should be measured. We agree with the trial court that it was reasonable to construe that ordinance as requiring measurement along public thoroughfares.

We have examined petitioner's remaining arguments and find them to be without merit. (Appeal from Judgment of Supreme Court, Allegany County,

Sprague, J. - Article 78.) Present: Doerr, J.P., Boomer, Green, Pine, Balio, JJ.

Supreme Court Memorandum, Decision, and Order.

Dated March 20, 1985.

STATE OF NEW YORK, SUPREME COURT,
COUNTY OF ALLEGANY.

In the Matter of the Proceedings
under Article 78 of the Civil
Practice Law and Rules,
JOHN K. C. HYSLIP,
Petitioner,

vs.

THE BOARD OF TRUSTEES OF THE
VILLAGE OF ALFRED,
THE ALFRED VILLAGE PLANNING BOARD,
THE ALFRED VILLAGE ZONING BOARD OF
APPEALS, and RICHARD S. LANG, as
ZONING OFFICER (but not individually),
Respondents.

This proceeding having formerly been entitled as set forth below:

JOHN K. C. HYSLIP,
Petitioner,

vs.

ROBERT SLOAN, Mayor; and JAMES VARNER, GARY OSTROWER, CAROLYN BLANKENSHIP and WILLIAM LaCOURSE, comprising the Alfred Village Board of Trustees; JAMES PALMER, Chairman of the Alfred Village Planning Board and SANDRA SCOFIELD, SUSAN KAZIN, ROGER FREEMAN, MARY HUNTINGTON, MARGARET PRISCO, and DIANE MARTIN comprising the Alfred Village Planning Board; and PETER FINLAY, Chairman of the Alfred Village Zoning Board of Appeals; and JAMES TINKLEPAUGH, ROGER MORITZ, EDITH PLACE, MARTHA JORDAN, comprising the Alfred Village Zoning Board of Appeals; and RICHARD S. LANG, Zoning Officer; and the VILLAGE OF ALFRED,

Respondents.

---Memorandum---

This proceeding under Article 78 of the Civil Practice Law and Rules was commenced concurrently with an action for declaratory judgment, the parties in each case are the same. Process was served in May of 1984 and argument heard in the summer of 1984 for summary judgment in favor of John K. C. Hyslip, petitioner-plaintiff. Special Term in Allegany County denied the motion for summary judgment and determined that before the Article 78 proceeding could be resolved, a determination was required under the declaratory judgment action to determine what zoning laws of the Village of Alfred applied.

The declaratory judgment action was referred to a trial term, given preference, and heard in trial term in Allegany County in October of 1984. Essentially that action determined the status of the zoning law of the Village of Alfred and certain amendments to such local zoning law. The hearing of the Article 78 proceeding had been ordered to then follow immediately, after the determination of the declaratory judgment action. The

October, 1984, trial term was running out and the trial court extended the term to determine the Article 78 proceeding. Petitioner then requested the trial justice to recuse himself from the hearing of the Article 78 proceeding and the trial justice obliged.

Petitioner then made both oral and written applications for special assignment of a judge to hear the Article 78 proceeding. The matter was heard on December 7th, 20th and 21st, 1984, and on February 21st, 1985.

Petitioner presented and had marked for identification 115 exhibits, substantially all of which were admitted into evidence. Petitioner called and examined twenty-eight witnesses during the hearing, most of whom were village officials under subpoena. Respondents introduced into evidence one exhibit and called one witness.

--- Essential Facts ---

There is no real dispute between the parties as to the facts, time, place, parties involved and the like. There is, however, a very great difference of opinion as to the legal effect of these facts as perceived by the petitioner and perceived by the respondents. John K. C. Hyslip, owner of a building in the Village of Alfred, seeks a building permit to operate a restaurant- type business including a pizza parlor operation and a health spa. Hyslip is also the owner of a vacant lot, which can be developed for parking lot purposes. The vacant lot is approximately 240 feet from the commercial site proposed, measured from the nearest corner of the commercial lot to the nearest corner of the parking lot. The parking lot is well over 300 feet from the commercial site when measured along public access. The initial application was presented to the zoning officer of the Village of Alfred. Since it was a commercial application, the application was referred to the Village Planning Board and that board in conjunction with the

Zoning Board of Appeals denied the application for the commercial use proposed.

There is some confusion as to whether the proper procedural steps were taken. There is no question that the parties involved were well-apprised of the proposed use, and well aware of the question of whether measurement of the distance from commercial building to parking lot should be along public access or in a straight line from the nearest part of the commercial lot to the nearest part of the parking lot property. Following the denial of the permit application of Hyslip and after the declaratory judgment action was commenced and the Article 78 proceeding was commenced, the Village Board adopted an amendment to the 1971 zoning ordinance stating that when measuring distances, to determine access for commercial purposes from the parking lot to the commercial purpose, the distance requirement must be measured along public access.

John K. C. Hyslip has been represented throughout by his attorney, William W. Pulos, Esq. The Village, including the various boards, agencies, and individual members of such have been represented by long-time Village attorney, Reginald J. Sootheran, Esq., and his associate, Robert G. Hutter, Esq., and as to trial of the two litigations by the firm of Shane and Franz, David M. Franz, Esq., of counsel.

- - - The Issues - - -

In this case the pleadings are voluminous, and at times the trial of the issues was at best ponderous and confusing.

This issues for determination are as follows:

1. Has petitioner named the proper parties as respondents?

2. Has James Palmer, Chairman of the Planning Board, acted unlawfully by reason of his private business interests and his public office?

3. Have the actions of James Palmer, or any other member of any official Village body been so inappropriate or unlawful so as to taint the final voted-upon official action of such board, which would require that board action to be set aside?

4. Is there any unlawful conflict of interest by any Village official or officials sitting on the various boards?

5. Has there been such a substantial failure by John K. C. Hyslip in following the required procedures in his application and appeals as to require the petition to be dismissed?

6. Has there been such a substantial failure by the various Village officials, boards and bodies in following the required procedures concerning the Hyslip application and appeals as to require the relief requested in the petition herein to be granted?

7. Was it an improper or unlawful determination of the Village officials, acting as duly constituted deliberative bodies, to decide that the distance between a commercial building and the parking facility must be measured along public access ways?

8. Was it improper or unlawful for Village officials to refuse to measure the distance between commercial use and parking facility in a
straight line, which passed through private property in another zone?

9. Is it necessary to apply any 1984 amendment to the Zoning Law in order to determine this Article 78 proceeding?

10. If the 1984 amendment, adopted late in the year 1984, is applied, is the result of any determination changed?

11. Does John K. C. Hyslip, owner of a property proposed for a commercial use, have the necessary off-street parking required under the Zoning Laws which were in force when he applied and which are now in force, which will entitle him to issuance of the zoning permit?

12. Are the actions of the Village Zoning Officer or the Planning Board or the Zoning Board of Appeals or the Village Board of Trustees, any one or all of them, arbitrary or capricious, contrary to law or unsupported by substantial evidence insofar as these actions relate to the denial of the Hyslip application or amended or modified application. [CPLR 7803]

For the reasons herein set forth, the answer to each of these questions is No.

- - - Trial Motion of Respondents Denied - - -

The respondents moved during the hearing on February 21st, 1985, to dismiss the petition on the grounds that the petitioner has filed a new application and therefore all proceedings herein are moot, the Court does not so find, and that particular motion to dismiss is denied.

- - - Decision - - -

After hearing the proofs submitted and the argument of counsel and reviewing the briefs submitted, the Court finds no conflict of interest of such a nature as to invalidate the decisions and determinations made by the various boards. True it is that members of the Planning Board knew members of the Zoning Board of Appeals and members of the Village Board were acquainted with other members of other boards in the Village and with other business people in the Village. Such acquaintanceship of local village officials, one with

another, all of whom were acting as part-time officials only, most of whom held other gainful employment in various places in and about the Village is not such an acquaintanceship or conflict of interest as to invalidate a properly voted board determination.

The Court notes that Hyslip objects to the action taken by James Grillo, a businessman who owned a pizza shop in Alfred. Grillo's pizza shop would be subject to the competition of the commercial use proposed by Hyslip; however, Grillo was not a member of any of the boards or bodies which are respondents in this proceeding. Hyslip points to the real estate transaction wherein James Palmer, chairman of the Zoning Board of Appeals, sold real property to James Grillo, and leased such property back for business purposes during the time that the application and determinations were in progress. Although such was the case, petitioner fails to spell out or prove any illegal conflict of interest and in fact the Court notes that on some occasions James Palmer abstained from voting on certain questions. The interests of James Grillo were certainly expressed to board members both at public hearings and otherwise; such action is a form of persuasion common to American government and cannot be pointed to as being illegal, improper or unethical. On the contrary it might well be noted here that petitioner Hyslip also chose a method of lobbying for the decision which he wished the appropriate board to make, by engaging counsel, attending meetings, going to the trouble and expense of hiring certified court stenographers to take a verbatim record of several public hearings and meetings in his attempt to get a ruling in his favor on the subject, although the methods used for persuasion by Grillo and by Hyslip are not the same, the Court perceives both to be methods of persuasion and lobbying, and not illegal, improper and unethical.

The petitioner, Hyslip, suggests that the Village officials acted improperly, maliciously, arbitrarily and

capriciously in denying the applications and hence have violated petitioner's civil rights and should be liable to petitioner for the losses he has suffered. The Court finds no such action on the part of Village officials, and the cause of action, if there be such, would not properly be tried in the Article 78 proceeding, which essentially is a proceeding against a municipal officer or body to compel or restrain certain action.

The Court having heard the arguments of respondents that the wrong parties have been named as respondents and hence the action should be dismissed finds the argument appropriate to a certain extent and inappropriate to dismiss the action in its entirety. It is the decision of the Court that as to all of the parties named individually, except for the zoning officer, that such parties in their individual capacities are inappropriate parties in this proceeding, and accordingly the proceeding against all such individuals is dismissed. Notwithstanding the rather ambiguous phrase added after the individual board members' names "comprising the _____ board" the Court finds and determines that the action was brought against and is continued as to the respondents who are, after dismissal of the individual respondents herein, as follows:

(a) the Board of Trustees of the Village of Alfred,

(b) the Alfred Village Planning Board,

(c) the Alfred Village Zoning Board of Appeals, and

(d) Richard S. Lang, as zoning officer (but not individually).

The Court finds and determines that the amendment to the 1971 Zoning Ordinance adopted late in the year 1984 by the Village of Alfred (as it relates to measurement of distance from parking lot area to

commercial use providing the requirement that such be measured "along public thoroughfares") was duly and properly enacted. A comprehensive revision and amendment to the Zoning Law was under consideration long before the commencement of the litigation herein, and such amendment was logical as a clarifying statement of what was intended for the situation under consideration.

The Court will consider the proper measurement procedure to be as provided in the amendment which was the procedure used by the boards originally in making their determinations. Petitioner argues that the case law spells out a rule that when special facts exist, respondent municipal governments may not change the law to deny petitioner the relief requested. There is no showing that the law, as amended was not under consideration at the time the litigation herein commenced. There is no showing that the amendment is intended specifically to resolve the case against Petitioner Hyslip and against him alone, and there is good sufficient reason for the Court to find that the amendment was made to clarify a section which needed attention. True it may be that Petitioner Hyslip is the first to have the explicit force of such amendment fall upon his business plans, but this is not to say he is the only such person who ever will be subject to such zoning ordinance requirement.

The petitioner, John K. C. Hyslip, requests the Court to strictly interpret the zoning ordinance. If such strict interpretation is against the Village interpretations and rulings, then Hyslip maintains such strict interpretations should prevail, since it is the Village which has seen to the adoption, enforcement and interpretation of the ordinance. In this regard the Court finds and determines that Hyslip has not been misled as to the problem involved, from the time of filing of the application for the commercial use he was aware that parking facilities and the measurement question could

be a problem. Any actions Hyslip has taken since October of 1983 have been with his eyes open, since he has been well aware since such time of the pending questions and possible problems, and has had the advice of counsel all along.

Petitioner Hyslip requests that strict interpretation of the zoning ordinance as it was adopted in 1971 be applied, such being the case he maintains that measurement should be from the nearest corner of the commercial use lot to the nearest corner of the parking lot, and that this is the correct interpretation to follow. Should the Court elect to determine the matter based upon very strict interpretation of the zoning ordinance, then it would be required to accept the argument of the respondents that the petitioner did not follow the proper procedural steps and therefore the proceeding should be dismissed for failure to exhaust administrative remedies and failure to properly appeal.

By adopting a more liberal interpretation of the case at hand the Court can find and determine that even if Petitioner Hyslip technically failed to follow the exact steps required by the zoning ordinance in making his application and filing an appeal concerning such application, such failure was technical in nature only, no board or administrative official or member of any such board was even misinformed or ignored. There has been adequate presentation, hearing and determination of the question, and therefore notwithstanding such technical deficiency on the part of the petitioner, no harm was done.

Having determined that some liberality should be allowed in interpretation, the Court now finds and determines that the obvious method for measuring the distance between the parking lot facility and the commercial use lot would require measurement along petitioner's properties or thoroughfares or along public thoroughfares. The zoning ordinance of 1971 prohibited

using access from the parking area to the commercial use through a residential district and such ordinance speaks in terms of the serviceability of the parking lot to the commercial use intended. The Court finds and determines that even if the 1984 amendment to the 1971 ordinance were not enacted, that the measurement should be along "public thoroughfares." To find otherwise would result in some very bizarre situations, such as a commercial building and a parking lot divided by a creek, but well within 300 feet of each other, but with no bridge closer than 1,000 feet. So whether the amendment applies or not, the method of measuring must be along public access and not through other private property in a conflicting zone.

This being the case, the proof in this case demonstrates that such distance is well over 300 feet and therefore the parking facility available and furnished by Petitioner Hyslip to service his proposed commercial use is not within the distance required by the Village of Alfred Zoning Law.

The Court understands that in order to grant the relief requested, it must find that action of the Village officials was arbitrary, capricious, contrary to law or unsupported by substantial evidence. The Court does not find the actions of the Village officials to be arbitrary or capricious nor contrary to law and does find the official actions supported by substantial evidence.

There have been many allegations and charges of impropriety, conflict of interest and of malice in government. While saying it is so, doesn't make it so, it is deemed appropriate to make some general observation concerning the general nature of the operation of small, local government. The right of all citizens to meet with and speak with the duly elected and appointed officials of local government and to seek thereby to persuade those officials to understand a local government problem or situation, whether it relates to business, domestic

comforts, education, residential problems or otherwise, and to try to get those local officials to act in a manner that each citizen deems appropriate must never be impaired; to make a finding or holding that such actions are pernicious and improper and hence must be prohibited flies in the face of fundamental concepts of government and is an affront to good common sense.

Although not controlling on the Court in making a final decision, weight shall be given to the number of times various local officials considered the question at issue, and the general degree of information available at the time the decision was made, regardless of whether that decision was made by a sole local official with delegated authority or by vote of an elected or appointed deliberative body of local government. When a matter in a local community has been under consideration for a substantial number of weeks or months and has received a fair degree of notoriety and successive decisions made by local officials and local boards on the subject have been substantially all in accord, then the Court must accord substantial weight to those decisions, absent fraud, deception, duress, bribery or other circumstances that would taint the entire decision-making process.

The decision of a sole local official made in good faith based on the usual and ordinary information presented to him in such situations without more should not be overruled or set aside by the Court.

In the case of elected or appointed local boards acting in the exercise of the deliberative process required to reach a decision, statements made, recorded or not recorded, oral observations made and questions asked, prior to the vote are not binding on that particular board and in fact in most cases should not be held binding on any individual member. There must always be a place in deliberation for the devil's advocate - - - it is the vote upon the resolution or proposition, which is the operative

action of such board, which articulates its decision as such board and is upon that board until modified, changed or annulled by its own subsequent vote or by some other officer, board or court having duly constituted authority to do so.

There are fundamental principles for the operation of local government units and courts must not be led into the local arena of participation on the premise that a better decision could have been made or that the Court must help because some of the people who were deciding were interested. Of course the people who were deciding were interested, else they would not have participated in the first place. Only when they have a palpable interest which is in direct conflict with applicant should the local officials abstain or withdraw. In this case with the benefit of 20-20 hindsight, there are some instances where a local official, by abstaining from voting or by withdrawing from the deliberations, might very well have eliminated any possible criticism; however, no instance is perceived in the case at bar when had that been done, the results would be any different than those that finally and actually did materialize.

Petitioner argues and re-argues that there is a "legislative zoning animous," bad faith, malicious intent, and conflicts of interest which require the official actions of the Village of Alfred, by its various boards and officers, to be set aside and which puts the case into the "Special Facts Exception" to the rule that the Court must apply the law as it exists at the time of the Court's decision. [See Matter of Pokoik vs. Silsdorf, 40 NY2d 769 (1976). Compare In Alaimo vs. Town of Greece, 68 AD2d 743 (1979); Matter of Alscut Investing Corp. vs. Village of Rockville Centre, 99 AD2d 754 (1984)].

In this case Petitioner Hyslip has not shown, much less proven by a preponderance of the evidence, any of the claimed "legislative zoning animous," bad faith,

malicious intent, conflicts of interest or reason to apply the special facts exception claimed.

The Court knows of no rule, either statutory or case law, that provides that if an applicant is ruled against enough times at many levels of application and appeal that such adverse rulings cummulatively will build up to some "special facts" or will "a fortiorori" prove "legislative zoning animous" to entitle such applicant to set aside such cummulative adverse rulings. On the contrary, such rulings are some indication that many persons at different levels saw the answer the same way, even though that is adverse to applicant.

It is noted that in this case petitioner's attorney elected to start his proof by the introduction of a very large portion of the documentary evidence without a lead-off witness to give a general picture of the nature of the problem. This led to substantial difficulty in determining the relevancy of each document offered; however, the Court did rule liberally in favor of petitioner and in view of the decision, error, if there was any, was more adverse to the successful party.

There is one area of proof and documentation that requires comment. During trial petitioner offerred certified stenographic transcripts of several public hearings. There is no statutory requirement for verbatim records of such public hearings and respondent objected to these transcripts as hearsay, which they are. That objection was sustained. Petitioner's counsel then chose to attach these same transcripts to his memorandum to the Court following the close of the case. This maneuver to bring something in through the back door that was clearly ruled out on the trial of the issues is, at best, very inappropriate. The record of the proof of the case consists of the testimony of the witnesses and the documents offered and received into evidence. The attachment of other documents or

records to memoranda submitted to the Court is not proof and the Court has not considered them.

Many of the petitioner's witnesses were Village officials and adversaries to his position. They were in Court under subpoena. Counsel for the petitioner elected to require all of the subpoenaed witnesses to remain on hand from the start of the proof until they had testified, although both opposing counsel and the Court suggested that a schedule might be worked out and these witnesses could be put on telephone notification for the twenty minute drive from the Village of Alfred to the Courthouse. This procedure of keeping all such witnesses right in the Courtroom may have resulted in some animosity which restricted the testimony. If that is the case, it is not deemed such a restriction or difficulty as to have unduly prevented counsel for the petitioner from fully developing his case. Petitioner's counsel might well have treated the time of the witnesses with more thoughtfulness.

---Order---

It is therefore ordered as follows:

I. ORDERED that all of the individual respondents in this proceeding are dismissed except for Richard S. Lang, Zoning Officer, and the action as to him is dismissed against him in his individual capacity and continued in his zoning officer capacity.

II. ORDERED that the case should have been entitled and is treated for disposition in this decision and order as follows:

STATE OF NEW YORK
COUNTY OF ALLEGANY

In the Matter of the Proceedings under Article 78 of the Civil Practice Law and Rules,

JOHN K. C. HYSLIP,

Petitioner,

vs.

THE BOARD OF TRUSTEES OF THE VILLAGE OFALFRED, THE ALFRED VILLAGE PLANNING BOARD, THE ALFRED VILLAGE ZONING BOARD OF APPEALS, and RICHARD S. LANG, as ZONING OFFICER,

Respondents.

III. ORDERED that the proceeding as to the Board of Trustees of the Village of Alfred, be and the same hereby is dismissed, such board having no determinative authority as to the Hyslip application, its evaluation or determination.

IV. ORDERED that the claim of petitioner against James Palmer, as to acting while under a conflict of interest or for acting unlawfully, improperly, maliciously or otherwise is dismissed.

V. ORDERED that all the relief requested by the petition be and the same hereby is in all respects denied, and accordingly the petition herein is dismissed as to the remaining respondents, Alfred Village Planning Board, Alfred Village Zoning Board of Appeals and Richard S. Lang, as Zoning Officer, not heretofore dismissed.

VI. ORDERED that no party herein shall be entitled to costs against any other party.

The foregoing shall constitute the memorandum, decision and order herein.

Peter R. Sprague
Acting Supreme Court Justice

Dated: March 20th, 1985

ENTER.

To: David M. Franz, Esq.

William W. Pulos, Esq.

Petition.

Dated May 4, 1984.

STATE OF NEW YORK, SUPREME COURT
COUNTY OF ALLEGANY

JOHN K. C. HYSLIP,

Petitioner,

vs.

ROBERT SLOAN, Mayor; et al.,

Respondents.

TO THE SUPREME COURT OF THE STATE OF NEW YORK:

The Petitioner herein, Mr. John K. C. Hyslip, Jr., hereinafter referred to as John, as and for his petition to this Court under Article 78 of the CPLR, by and through his attorney, William W. Pulos, Esq., respectfully shows and alleges to this Court as follows:

1. John is a resident of the Village of Alfred, residing at or about Three Elm Street, Village of Alfred, County of Allegany, State of New York.

2. The individual Respondents named above comprise, upon information and belief, the Alfred Village Board of Trustees, the Alfred Village Planning Board, and the Alfred Village Zoning Board of Appeals, and the Zoning Officer for the Village of Alfred, respectively, and, upon information and belief, Respondent Village of Alfred is a municipal corporation duly existing and created under the laws of the State of New York ...

15. John's application, which is complete on its face and timely, has been ministerially denied by the Respondents on this issue ...

23. The procedure outlined in Alfred Village Zoning Ordinance section 306.0 has not been followed, specifically, in that it has not been shown that at least thirty (30) days before the date of the hearing (2/21/84) on this application to appeal to the Board of Appeals, that the secretary of the (zoning) Board transmitted to the Planning Board a copy of John's notice of appeal of the hearing and requested that the Planning Board submit to the Zoning Board of Appeals, its opinion on John's appeal. It further has not been shown that the Planning Board submitted a report of such advisory opinion prior to the date of the hearing (2/21/84). A fortiorari, this

failure to submit such report constitutes approval of John's application and appeal ...

36. From the above, the actions of the Respondents, both singularly, and in the aggregate, have been arbitrary, (without adequate determining principals and without cause based upon the Law), and capricious (willful and deliberate) attempts to preclude Mr. Hyslip from the rights accorded him as a citizen of the State of New York and of the United States. (emphasis supplied) T-1 p. 14, 17, 18, 22, 23; T-2 p. 8, 9, 11, 17, 19, 20, 21, 24, 25; T-3 p. 7, 8, 9, 10, 11, 18, 20, 21, 40; T- 4 p. 68.

37. John's proposed use is in the proper zone, T-2 p. 17; John has complied with all lawful requests of the Respondents and has measured the appropriate distance (which is the sole legal issue) between the proposed use and parking lot, T-1 p. 28, 30; and the parking is clearly within the ambit and purview of the applicable Zoning Ordinance. T-2 p. 2.

WHEREFORE, the Petitioner in this action, Mr. John K. C. Hyslip, Jr., hereby respectfully prays this Court:

1. Order and issue a writ of mandamus under Article 78 to compel the Respondents to overturn their administrative decision and grant John a building permit;

or in the alternative

2. Order an immediate trial of the triable issues of fact by a jury in this Court to determine whether the decision below was proper and legal, and, if the decision was illegal, order the Respondents to grant John a building permit as applied for;

or in the alternative

3. For an order reversing the decision of the Respondents based upon improper procedure as outlined in this petition and order the Respondents to rehear and recommence the application process in its inception under the applicable laws, rules and regulations that were in effect at the time the original application was submitted by the Petitioner ...

CERTIFICATION

I, MARGARET (PEG) PRISCO, am under a Judicial Subpoena Duces Tecum to provide any and all records regarding submission of a request from the Zoning Board of Appeals to the Planning Board requesting an Opinion on the appeal of John K. C. Hyslip and the submission of a report of the Planning Board Advisory Opinion submitted prior to the date of the Zoning Board of Appeals Hearing, pursuant to 1971 Zoning Local Law of the Village of Alfred, Section 306.0.

1. That I make this certification in lieu of an appearance as required by the Subpoena which I have been properly served with.

2. That I have searched my records and I do not find a written request from the Zoning Board of Appeals requesting that the Planning Board submit a Report of Advisory Opinion to the Zoning Board of Appeals prior to the date of the Zoning Board of Appeals Hearing on the appeal of John K. C. Hyslip.

3. That I have searched my records and I do not find a record of submission of a Report of Advisory Opinion from the Planning Board to the Zoning Board of Appeals as per Section 306.0 of the 1971 Zoning Local Law of the Village of Alfred.

4. That it is my understanding that this Certification is being stipulated as evidence and it is further my understanding that this document is to be executed by

me as a certification in its entirety and that any alteration of this Certification prior to my execution of it renders the Certification void and mandates that I be available for personal appearance upon judicial subpoena and that the purpose of this Certification is predicated upon my request to my attorney to leave the State of New York, and that this statement is not at the behest of plaintiff or plaintiff's attorney.

MARGARET PRISCO
Secretary
Alfred Village Planning Board

Dated: October 12, 1984

I, REGINALD J. SOOTHERAN, ESQ., certify to the Supreme Court of the State of New York, that on October 12, 1984, before me appeared MARGARET PRISCO who acknowledged to me, and in the presence of me, that she was the Secretary of the Alfred Village Planning Board and acknowledged, certified, and verified the truthfulness of the statements contained on this Certification.

REGINALD J. SOOTHERAN, ESQ.
Notary Public
Attorney for The Village of Alfred

Dated: October 12, 1984

State of New York)
County of Allegany) ss.:

I, John C. Bridge, Clerk of the Alfred Village Board of Trustees do hereby certify that I have compared the foregoing copy of the Prisco Certification with the original thereof on file in this office and that it is a

correct transcript therefrom, and of the whole of such original.

WITNESS my hand and the seal of said Board at Alfred, N.Y., this 23d day of October A.D., 1984.

JOHN C. BRIDGE

Appellate Division Brief.

Filed July 3, 1986.

STATE OF NEW YORK, APPELLATE DIVISION
FOURTH DEPARTMENT

JOHN K. C. HYSLIP,

Petitioner - Appellant,

-against-

ROBERT SLOAN, Mayor, et al.,

Respondents.

POINT I

THE RESPONDENTS FAILURE TO COMPLY WITH THEIR ADMINISTRATIVE REFERRAL PROCEDURE, ZONING ENABLING PROVISIONS, AND NOTICE REQUIREMENTS MANDATE REVERSAL.

The 1971 Alfred Village Zoning Law (#19) provided a strict set of rules regarding the administrative handling

of a zoning appeal. Specifically, the law as applied mandated an internal referral procedure to be utilized upon the filing of a zoning appeal. That section provided, in pertinent part, as follows:

The Board of Appeals shall act in strict accordance with the procedure specified by law and by this Ordinance... At least thirty (30) days before the date of the hearing on an application to appeal...., the Secretary of said Board shall transmit to the Planning Board a copy of this notice... and shall request that the Planning Board submit to the Board of Appeals, its opinion on said... appeal, and the Planning board shall submit a report of such advisory opinion prior to the date of said hearing.

Failure to submit such report shall constitute approval of said application or appeal by the Planning Board." Id. at p. 17.

The procedural steps required by the enabling acts of villages are regarded as mandatory. **Town of Schroeppel, Oswego County v. Spector** 43 Misc. 2d 290, 251 N.Y.S.2d 233 (Sup. Ct. Oswego County 1963).

The Zoning Board of Appeals failed to follow their internal mandatory referral procedure. (#4). There is no documentation on file with the Village Clerk referencing compliance with the 1971 Alfred Village Zoning Law, s. 306.0 (#19, 30).

The affidavit of Margaret Prisco, secretary of the Planning Board, sworn to in open Court on Friday, October 12, 1984, affirms unequivocally that the procedure was not followed (#4).

In this case, Planning Board minutes of December 15, 1983, p. 2 (#14) acknowledge the responsiblity for the statement of reasons for denial within 30 days of request from the Zoning Board of Appeals. The Planning Board

was on notice of this mandated procedure. No opinion was ever filed by the Planning Board.

The Planning Board failed to file a report subsequent to the appeal to the Zoning Board of Appeals. The Planning Board minutes reveal that both the Zoning Board of Appeals and the Planning Board had previously dealt with this reporting function, on other applications. This referral report was a condition precedent to an administrative denial (#6, #14).

Under 306.0 of the 1971 Zoning Local Law, the referral default equates as an approval of the application automatically, as a matter of law.

Matter of L.F. Letts & Son, Inc., et al., v. City of Cortland et al. 47 Misc.2d 240, 262 N.Y.S.2d 294 (Sup. Ct. Sp.T. Cortland County 1965), speaks directly to a failure to follow administrative referral procedure.

In **Letts**, the municipality failed to follow the proper procedure for enacting an amendment to a zoning ordinance. The Court found that the referral procedure mandated by the local ordinance was to be strictly construed, and failing proper implementation, the contested amendment was void, as applied to Petitioner.

Respondents here have additionally failed to prove compliance with s. 109.1 (B) of the 1971 Zoning Local Law (#19), in the handling of Petitioner's original application. The required filing with the Village Engineer, in accordance with this section was not shown to have been made nor waived.

As to the 1984 amendment to the 1971 zoning law, failure to comply with (local enabling) acts invalidates a proposed amendment (to a zoning law). **Village of Mill Neck v. Nolan** 259 N.Y. 596 (1932), **Barry v. Town of Glenville** 8 N.Y.2d 1153 (1960).

Respondents failed to notify the Town of Alfred (a contiguous municipality) of the November 15, 1984 hearing regarding the "protective amendment" to the 1971 Alfred Village Zoning Law (102-103, 575). This runs contrary to Village Law s. 7-706 (1), which provides in pertinent part:

A written notice of any proposed change or amendment affecting property within five hundred feet of the boundaries of any ... town.... shall be given in the case of a... town to the clerk of such... town... at least ten days prior to the date of such public hearing.

Respondents failed to prove the "amendment" was ever posted, nor that an affidavit of posting was ever filed with the village clerk, as required by Village Law 7-706 (2) which provides in pertinent part:

Every zoning... amendment... adopted pursuant to... this chapter... shall be posted conspicuously at or near the main entrance to the office of the village clerk and affidavit(s) of ... posting therof shall be filed with the Village clerk.

The cases require strict compliance with statutory direction, particularly Village Law s. 7-706 (1). **Marcus v. Spring Valley** 24 A.D.2d 1021, 265 N.Y.S.2d 985 (2d Dep't 1965), **Atiyeh et al. v. Village of North Hills et al.** 91 Misc. 2d 365, 398 N.Y.S.2d 107 (Sup. Ct. Sp.T. Nassau County 1977).

Absent strict compliance, Respondents improper actions are voided and Petitioner's application should be strictly construed and approved.

Court of Appeals Brief.

Dated February 16, 1987.

STATE OF NEW YORK
COURT OF APPEALS.

JOHN K. C. HYSLIP,

Petitioner - Appellant,

-against-

ROBERT SLOAN, Mayor; et al.,
Respondents.

NOTICE OF MOTION AND MOTION
FOR LEAVE TO APPEAL

... II. As a result, the Trial Term and Appellate Division, 4th Department, erred by failing to harmonize their respective decisions with the law of this Court. The Appellant prevails on the merits.

The Courts below failed to harmonize their decisions with the law of this Court which decided in **440 East 100 Second Street Corporation v. Murdock, et al.** 285 N.Y. 298 (1941):

... the whole and each and every of the parts (of the Zoning Ordinance) must be given a strict construction since they are in derogation of Common Law rights. The provisions of the resolution may not be extended by implication ...Id. at p. 304., and **Thompson Industries, Inc. .v.Incorporated Village of Port Washington North** 27 N.Y.2d 537 (1970).

At trial, the Trial Justice made reversible errors in the finding of the facts and interpretation of the law regarding the issues of 1) failure of Respondents to follow their administrative procedure, 2) failure to find the special facts which would set this case apart from the general category of zoning cases, 3) failure to find unequal treatment of the Appellant locally by Respondents, and 4) failure to find egregious violations of the Public Officers law on the part of Respondents.

At the very least, the presumption arises that had the facts been found differently, the application of the law, as set out in the brief to the 4th Department, would apply to the benefit of Appellant.

The decisions of the Courts below fail to acknowledge the strict construction and interpretation of the Law of this Court. This is particularly so regarding McKinney's Statutes, s. 240 and 301. Specifically, the law provides for the strict construction of zoning statutes in favor of applicants, as local zoning laws operate in derogation of the common law.

For example, in either of the zoning laws of Respondents 1985 (Exhibit 102 s. 406 (E)(4)], or s. 306.0 of the 1971 zoning law (Exhibit 19), both of them provide substantially in part:

... At least thirty (30) days before the date of the hearing .... The Secretary of ... shall transmit to the Planning Board a copy of (this notice) and shall request that the Planning Board send to the Board of Appeals, its opinion on said application or appeal (1971) (one week prior to the hearing the Planning Board will transmit to the Zoning Board of Appeals its opinion on the application or appeal (1985) ...

Failure to submit such report shall constitute approval of said application or appeal by the Planning Board ...

At trial, it was shown this provision was never complied with at the time of Appellant's application to the Zoning Board of Appeals. The Affidavit of Respondent Planning Board Secretary, Margaret Prisco, was admitted and not controverted (Exhibit #4).

This internal mandatory referral procedure was not performed by Respondents. Thus strict construction of the ordinance, as provided in s. 306 of the 1971 law and s. 406 (E)(4) of the 1985 law, requires a finding that Petitioner's application had been approved.

Appellant has proven beyond a reasonable doubt that the required administrative referral under either law was not made, thereby triggering the case law set forth in **440 East100 Second Street Corporation v. Murdock, et al.** 285 N.Y. 298 (1941) and **Thompson Industries, Inc. v. Incorporated Village of Port Washington North** 27 N.Y.2d 537 (1970).

A proper finding of fact, then, absolutely favors Appellant.

Appellant was denied the opportunity to a fair and impartial forum at trial which denied him the finding which is demonstrated by the evidence.

Appellant is entitled to a reversal and grant of a building permit under these facts. He firmly believes that the partiality and bias demonstrated affects the final resolution of his matter, **Johnson v. Hornblass** 93 A.D.2d 732 (1st Dep't 1983, Judge Alexander concurring), it operates to the detriment of the Appellant, and it unjustly affected the result. **State Division of Human Rights v. Merchants Mutual Insurance Company** 59 A.D.2d 1054 (4th Dep't 1977, Judge Hancock concurring) at p. 1056.

BEST AVAILABLE COPY

Regardless of good intentions and absence a finding of demonstrated prejudice, the integrity of the judiciary must prevail and public policy must be invoked here.

Leave to appeal is requested.

Respectfully submitted,

WILLIAM W. PULOS, ESQ.

Dated: February 16, 1987
Alfred, New York